

August 29, 1983

MEMORANDUM

TO : Dr. Everett R. Rhoades  
Director, Indian Health Service, PHS

SUBJECT: The Department's Authority to Lease Building  
Space From Indian Tribes Under The Indian Health  
Care Improvement Act

FROM : Darrel J. Grinstead *for*  
Assistant General Counsel  
Business and Administrative Law Division

By memorandum dated April 19, 1983, you requested our advice whether the Indian Health Care Improvement Act, as amended, 25 U.S.C. 1601 et seq. (the Act), provides authority for the Department to lease "administrative space" directly from Indian tribes. Our opinion, which has been coordinated with and concurred in by the Public Health Division, is that the Act can be interpreted to provide such authority.

We understand that your concern is whether the Act provides authority to lease space from Indian Tribes to be utilized wholly or predominantly by the Indian Health Service (IHS), for administrative purposes. The specific leases referenced in your request as examples of such "administrative space" are leases for the Indian Pueblo Cultural Center in Albuquerque, New Mexico, which expired in early May, 1983.<sup>1/</sup> Your staff informed us that this leased space is utilized almost exclusively by the IHS as offices for its Western headquarters and that IHS provides very little, if any, health care services at this location.

Your request references previous Office of General Counsel (OGC) opinions interpreting the extent of the leasing authority under the Act. Those opinions concluded that this authority is limited to leases entered into "...in carrying out the purposes of the Act"<sup>2/</sup> and found that the lease of

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<sup>2/</sup> April 19, 1979 opinion of Henry Pike of this Division to Richard McCloskey of IHS.

[illegible]

staff housing for IHS hospital personnel was a legitimate use of this authority since the lease provided a "related support factor" contemplated by the Act.<sup>3/</sup> You note that OGC has not yet been asked to provide advice on what other types of space may be leased by the Department under the Act. The current IHS view is that the Act provides authority to lease all "administrative space" needed to support the IHS's health care responsibilities to the Indian people.<sup>4/</sup>

The General Services Administration (GSA) has been provided by Congress with the general statutory authority to lease all building space for Government agencies.<sup>5/</sup> GSA's implementing regulations on leasing and space utilization divide all space in Government owned and leased buildings into two categories, i.e., "general purpose space" and "special purpose space." 41 CFR 101-17.003 and 18.1. "General purpose space" is space suitable for use of agencies generally, and includes "office space," "special space," e.g., an auditorium, and "storage space." The IHS headquarters building in Parklawn and the IHS area offices are examples of "general purpose space". "Special purpose space" is space utilized wholly or predominantly for the special purpose of an agency and not suitable for the use of other agencies.

The "administrative space" with which you are concerned falls within the "general purpose space" classification since the space is used primarily for the offices of IHS administrative staff. This type of space, which we will refer to for purposes of clarity throughout the remainder of this opinion as "general purpose space," is not to be confused

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3/ May 17, 1982 opinion of the Regional Attorney, Region V to Director, ROFEC Region V.

4/ We note that in February, 1980, the Deputy Director of IHS, in a memorandum on space acquisition, addressed to all area program directors of the IHS, advised that the Senate Committee on Appropriations was concerned about IHS's use of this leasing authority. The Deputy Director also expressed the opinion that the Act authorized leasing of "special purpose space" only. The memorandum indicated that "administrative space" can only be acquired through the IHS construction program, under the General Services Administration's assigned space procedures, by Federal use permit or by payment of a nominal rent.

5/ 40 U.S.C. 490(h)(1), and Section 1 of Reorganization Plan No. 18 of 1950, 40 U.S.C. 490 Note.



with space utilized for administrative purposes within a "special purpose space" facility, e.g., the offices of IHS doctors and administrative staff at an IHS hospital. Such space, located in and directly utilized for a "special purpose space" facility, is considered part of the "special purpose space."

The Indian Health Care Improvement Act states our authority as follows:

Notwithstanding any other provision of law, the Secretary [of Health and Human Services] is authorized in carrying out the purposes of this chapter [Act], to enter into leases with Indian tribes for periods not in excess of twenty years.... 25 U.S.C. 1674.6/

Since this leasing authority is limited by its own terms to leases entered into for carrying out the purposes of the Act, we must look to the Act and its legislative history to determine the extent of the leasing authority provided to the Department.

The "Congressional Findings" in the Act, 25 U.S.C. 1601, addressed certain problems that imperiled further improvement in Indian health. The specific problems mentioned were: (1) inadequate, outdated and understaffed IHS facilities; (2) shortages of IHS personnel; (3) insufficient provision of inpatient and outpatient services by the IHS; (4) shortages of related support factors such as lack of staff housing at remote IHS facilities; (5) lack of access to health services by Indians; and (6) inadequate sanitary and sewage facilities for Indian housing units.

These problems, including the shortages of related support factors, all pertain to Indian health care and the provision of Indian health care services. See S. Report No. 94-133, 94th Cong., 1st Sess. (1975) (Senate Report or Report). The reference in the Act and discussion in the Senate Report dealing with these support factors, pp. 38 & 109, detail one

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6/ Section 8(a) of Public Law 96-537, the Indian Health Care Amendments of 1980, added a provision to 25 U.S.C. 1674 that property leased by the Secretary from an Indian tribe may be reconstructed or renovated by the Secretary pursuant to an agreement with the Indian tribe.



specific example of such a problem, i.e., lack of housing for professional staff at remote IHS health care facilities. This problem was considered as part of the larger problem faced by the IHS in recruiting and retaining sufficient medical staff.

On the other hand, the scope of the Act itself is quite broad. It includes such diverse activities as grants and contracts with tribal organizations to assist in the administration of programs, and grants for continuing education. It may be assumed that the Act authorizes those administrative activities necessarily incidental to carrying out the specific mandates of the Act.

The Department's leasing authority is addressed in only one place in the Senate Report and provides us with limited background on the objectives to be achieved by granting that authority to the Department. The Report states, at p. 143, that:

This provision is designed to meet two objectives: First, it would strengthen the self-determination effort by permitting contracts with tribal groups who desire to construct health facilities for lease to the Indian Health Service and allow tribes constructing such facilities to realize a return from their capital investment. Second, this provision would strengthen the health delivery system by providing the new facilities to the IHS by lease upon completion of their construction.

The Report points out that such leasing would be in lieu of Federal construction of these facilities. As examples of these facilities, it cites a number of remotely located Indian communities in Oklahoma which are building health facilities which would then be leased to the IHS for use in the delivery of health services to the Indians. The Senate Report concludes its discussion of the leasing authority by describing it as a method by which small Indian communities, in less populous states, could provide assistance to the IHS in fulfilling its responsibility to provide high quality health care to the Indian people.

It is noted that neither the Act nor its legislative history either specifically limits the Department's leasing authority to "special purpose space" or prohibits the leasing of "general purpose space." Since 1979, however, the Congress has expressed its desire to control the use of IHS appropriations for the leasing of facilities. Thus, the Interior Department's





and Related Agencies Appropriations For Fiscal Year 1983, which includes this Department's appropriations for IHS, provides "...none of the funds appropriated under this Act to the Indian Health Service shall be available for the initial lease of permanent structures without advance provision therefor in Appropriations Act." Public Law 97-394.

Based on our review of the Act and its legislative history, we conclude that a reasonable legal argument may be made that the leasing authority granted to the Secretary includes the leasing of space to be used principally for administrative purposes, so long as the administrative function involved is a necessary incident to the proper implementation of the specific purposes of the Act. While the attendant legislative history demonstrates a narrower focus, i.e., a leasing of space to be used for the actual provision of health care, the language of section 1674 itself is not so limited and, therefore, permits a broader construction.





DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

**Memorandum**  
INDIAN HEALTH SERVICE

Date December 19, 1984

From : Richard J. McCloskey, Chief,  
Legislation and Regulations Branch, OPEL

Subject: Legal Opinion to be Added to the "Compendium of Legal Opinions  
Concerning the Indian Health Service"

To : See Below

Attached is a legal opinion subject: The Department's Authority to Lease Building  
Space from Indian Tribes under the Indian Health Care Improvement Act

DATE OF OPINION: 8/29/83

SOURCE: OGC/BAL

If you are in addressee Category A or B (see below), you should place the opinion  
in your Compendium in chronological order. No future publication or distribution  
of this opinion will be made. The opinion will be indexed under the following  
subject(s) which you should note in your Compendium's "Subject Index" until such  
time as a revised "Subject Index" is published and distributed:

Lease: P.L. 94-437; Real Property

Occasionally, an opinion will require establishment of a new Subject which must be  
added to the Subject Index. Any new Subjects required by this opinion follow:

None

If you are in Category C, you are being sent this opinion because of some factor  
specific to this opinion or your responsibility. You will not receive other  
opinions as a matter of course. You may be able to utilize the Compendium held by  
Category A and B addressees. The addressees represent the total distribution  
being made of this opinion by the Legislation and Regulations Branch.

Attachment  
Legal Opinion

COMPENDIUM ADDRESSEES

Category A: Holders of the full Compendium

Director	Indian Health Service (1 Set)
Analyst	Legislation and Regulations Branch (IHS Master Set)
Chief	Legislation and Regulations Branch, IHS (1 Set)
Sr. Analyst	Legislation and Regulations Branch, IHS (1 Set)
Director	Aberdeen Area Office (1 Set) <u>Attn:</u> Area Director;

(Continued on Reverse)

Category A: Holders of the full Compendium (Cont'd)

Director, Alaska Area Office (4 Sets) Attn: Area Director; Office of Program Formulation; General Services Branch; and Alaska Native Medical Center  
Director, Albuquerque Area Office (1 Set)  
Director, Bemidji Program Office (1 Set) Attn: Mr. Lefebvre  
Director, Billings Area Office (1 Set) Attn: Ms. Christensen  
Director, California Program Office (1 Set)  
Director, Navajo Area Office (2 Sets)  
Director, Oklahoma City Area Office (1 Set)  
Director, Phoenix Area Office (1 Set) Attn: Mr. Palone  
Director, Portland Area Office (1 Set)  
Director, Office of Research and Development (Tucson) (1 Set)  
Director, Nashville Program Office (1 Set)  
OGC Public Health Division (1 Set) Attn: Mr. McCloud  
PHS Indian Hospital, Rapid City, South Dakota (1 Set) Attn: Ms. Mildred Breen  
DHHS Regional Attorney, Region V, Chicago (1 Set) Attn: Indian Desk  
DHHS Regional Attorney, Region VI, Dallas (1 Set) Attn: Indian Desk  
DHHS Regional Attorney, Region VII, Kansas City (1 Set) Attn: Indian Desk  
DHHS Regional Attorney, Region VIII, San Francisco (1 Set) Attn: Indian Desk  
DHHS Regional Attorney, Region X, Seattle (1 Set) Attn: Mr. McBride

Category B: Holders of the partial Compendium

Associate Director, Office of Administration and Management (1 Set)  
Associate Director, Office of Tribal Activities (1 Set)  
Associate Director, Office of Planning, Evaluation and Legislation (1 Set)  
Associate Director, Office of Program Operations (1 Set)  
Director Division of Community Development and Tribal Support (1 Set)  
Personnel Operations Branch (1 Set) Attn: Mr. Sharlow  
Chief Contract Health Care Branch, IHS (1 Set)  
Chief Contracts/Grants Management Branch, IHS (1 Set)  
Chief Resources Management Branch, IHS (1 Set)  
Chief Environmental Health Branch, IHS (1 Set)  
CHS Office Aberdeen Area Office (1 Set) Attn: Mr. Baybars  
CHS Office Alaska Area Office (1 Set) Attn: Mr. Moffatt  
CHS Office Albuquerque Area Office (1 Set) Attn: Mr. Beckwith  
CHS Office Bemidji Program Office (1 Set) Attn: Ms. Anderson  
CHS Office Billings Area Office (1 Set) Attn: Mr. Littlelight  
CHS Office Navajo Area Office (1 Set) Attn: Mr. Gillson  
CHS Office Oklahoma City Area Office (1 Set) Attn: Mr. Wahpepah  
CHS Office Phoenix Area Office (1 Set) Attn: Ms. Kerrigan  
CHS Office Portland Area Office (1 Set) Attn: Ms. Hansel  
CHS Office California Program Office (1 Set) Attn: Mr. Jamison  
CHS Office GRD, Tucson (1 Set) Attn: Mr. Howard  
CHS Office Nashville Program Office (1 Set) Attn: Dr. Betts  
Facilities Management Branch, IHS, Albuquerque (1 Set) Attn: Mr. Shopteese  
PHS Claims Division (1 Set) Attn: Mr. Simon  
OGC, BAL Division (3 Sets) Attn: AGC; Mr. Tim White; and Ms. Sarah Hertz  
OGC, PH Division (1 Set) Attn: Ms. Reusing  
Director, Division of Indian Resources Liaison (1 Set)

Category C:

7-1-1965 JAN 18 1965

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FACILITIES MGMT. BRANCH



DEPARTMENT OF HEALTH & HUMAN SERVICES

RF0: 83-4  
August 29, 1983  
Office of the Secretary

Office of the General Counsel  
Washington, D.C. 20201

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MEMORANDUM

TO : Dr. Everett R. Rhoades  
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